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IN THE

Supreme Court of the United States

October Term, 1948

No. 220

A. F. WHITNEY,

Petitioner,

vs.

T. M. MADDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

May It Please The Court:

The petition of A. F. Whitney respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action to recover damages for libel and it was instituted in the Superior Court of Cook County by personal service of the summons and complaint on the respondent in Chicago, Illinois, on February 6, 1947. The complaint was both filed and served personally on the respondent on that day (R. 1, 3). At all times material petitioner was a citizen of Ohio residing at Cleveland in

that state; respondent was a citizen of Minnesota residing at International Falls in that state (R. 4). Upon motion of respondent, on June 6, 1947, the trial court made the following order (R. 3):

> "IT IS HEREBY ORDERED, the court having heard the arguments of counsel for both sides and having considered the plaintiff's argument that to allow this motion would be to violate alleged constitutional rights of the plaintiff under Article IV, Section 2 of the Constitution of the United States, that jurisdiction of this cause be, and the same is hereby declined, because of the doctrine of forum non conveniens and the cause is accordingly dismissed, and it is HEREBY ORDERED, that this order supersedes and rescinds an earlier order entered this same day.
>
> "James M. Corcoran,
>
> "June 6, 1948. Judge.

Because the decision of the trial court quoted above violated constitutional rights of the plaintiff under Article IV, Section 2, and the Fourteenth Amendment of the Constitution of the United States, this appeal was taken directly to the Supreme Court of the State of Illinois, pursuant to Article VIII, Section 75, of the Civil Practice Act of Illinois.

OPINION OF THE COURT BELOW

The Supreme Court of Illinois in *A. F. Whitney v. T. M. Madden,* —— Ill. ——, 79 N. E. (2d) 593, affirmed the decision of the trial court. Copy of the opinion, R. 6, et seq.

THE QUESTIONS PRESENTED

The principal questions presented to the Trial Court and to the Supreme Court of Illinois were:

1. Whether the order of dismissal was contrary to and in violation of the privileges and immunities clause of the United States Constitution. (Article IV, Section 2, and Fourteenth Amendment, U. S. Constitution.)

2. Whether the doctrine of forum non conveniens had any application under the circumstances of this particular case.

3. Whether the doctrine of forum non conveniens obtains or exists in the State of Illinois.

All of these questions were decided by the Supreme Court of Illinois adversely to the petitioner.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Supreme Court of Illinois has erroneously decided federal questions of substance in conflict with the decisions of this Court and the Circuit Courts of Appeal, to-wit:

A. In affirming the order of dismissal contrary to and in violation of the privileges and immunities clause of the Constitution of the United States (Article IV, Section 2, and Fourteenth Amendment, U. S. Constitution), and contrary to the policy announced by this Court in *Corfield v. Coryell,* 4 Wash. C. C. 371, Fed. Case No. 3230; *Paul v. Virginia,* 8 Wall. 168, 180; *McKnett v. St. Louis-San Francisco Ry. Co.,* 292 U. S. 230, 54 S. Ct. 690; *Chambers v. Baltimore & Ohio R. Co.,* 207 U. S. 142, 28 S. Ct. 34.

B. In dismissing the said cause under the doctrine of forum non conveniens contrary to the policy announced by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839; *Cox v. Pennsylvania R. Co.*, 72 F. Supp. 278; *Neal v. Pennsylvania R. Co.*, 77 F. Supp. 423.

It is essential that a Writ be granted in order to determine an important question relating to the construction and interpretation of Article IV, Section 2, and the Fourteenth Amendment of the United States Constitution. It is the contention of the petitioner that the trial court and the Supreme Court of Illinois have violated the United States Constitution.

PRAYER

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Illinois, commanding said court to certify and send to this Court the transcript of record in the case entitled, "A. F. Whitney, Plaintiff-Appellant, vs. T. M. Madden, Defendant-Appellee, number 30384," including also the proceedings in said trial court, together with the Illinois Supreme Court's denial of petitioner's request for reversal, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

The facts with reference to the origin and history of the case have been sufficiently covered in the petition, and in the interests of brevity will not be here repeated. The issues and the questions before the Court have been discussed in the preceding petition so that the detailed picture need not be repeated.

Specifications of Errors to Be Urged.

The Supreme Court and trial court of Illinois erred:

1. In holding as a matter of law that the order of dismissal did not violate the privileves and immunities clause of the United States Constitution. (Article IV, Section 2, and the Fourteenth Amendment of the United States Constitution.)
2. In applying the doctrine of forum non conveniens so as to violate the privileges and immunities clause of the United States Constitution.

ARGUMENT

I.

The Order of Dismissal Was in Violation of the Privileges and Immunities Clause of the United States Constitution. (Article IV, Section 2, and the Fourteenth Amendment of the United States Constitution.)

The trial court by its order of dismissal violated the privileges and immunities clause of the United States Constitution and petitioner's right to have this action heard in the State of Illinois should not have been ques-

tioned. Article IV, Section 2, of the United States Constitution, provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Fourteenth Amendment of the United States Constitution, Section 1, provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; * * *."

One of the highest privileges and immunities of citizenship is the right of access to the courts of the several states for the purpose of maintaining actions. The proper rule is stated in 12 Am. Jur., Section 464, wherein it is said:

> "Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind—a right which cannot be abrogated or even suspended. It has been said that the right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon the comity between the states, but is guaranteed by the Federal Constitution. If the state provides a court to which its own citizens may resort in a certain class of cases, citizens of other states of the Union also will have a right to resort to it in cases of the same class."

American Jurisprudence then goes on to say on page 118:

> "The effect of the privileges and immunities clause in relation to access to the courts has been raised

most often in those cases in which courts have sought to decline jurisdiction of transitory actions in which the plaintiff or both of the parties are non-residents of the forum. The position has generally been taken that under Article IV, Section 2, a state court cannot decline to entertain an action by a citizen of another state, even though the cause of action arose outside the state of suit and although the defendant is also a non-citizen, unless the circumstances of the case are such that the court would also decline the action if brought by a citizen of the state of suit * * *."

The United States Supreme Court from time immemorial has always held that the citizens of the several states have the protection of the privileges and immunities clause of the United States Constitution.

A leading case on this question is that of *Corfield v. Coryell,* 4 Wash. C. C. 371, Fed. Case No. 3230, wherein Mr. Justice Washington said in regard to the privileges and immunities clause:

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety—subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade,

agriculture, professional pursuits, or otherwise; to claim the benefit of the right of habeas corpus; *to institute and maintain actions of any kind in the courts of the state;* to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised * * *." (Italics ours.)

The United States Supreme Court also spoke out strongly in the case of *Paul v. Virginia,* 8 Wall. 168, 180, wherein the court observed that:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this * * *."

This rule is strictly followed throughout the United States, and the United States Supreme Court in *McKnett v. St. Louis-San Francisco Ry. Co.,* 292 U. S. 230, 54 S. Ct. 690, stated:

"The privileges and immunities clause requires a state to accord to citizens of other states substan-

tially the same right of access to its courts as it accords to its own citizens * * *."

It is the position of the petitioner here that a state court cannot decline to entertain an action by a citizen of another state even though the cause of action arose without the state of suit, and though the respondent is also a non-resident, unless the circumstances of the case are such that the court would also decline the action if brought by a citizen of the state of suit. It is undisputed in this case that if the petitioner were a resident of Illinois he could bring this suit. Therefore, under the privileges and immunities clause he still has a right to bring the suit even though he is a non-resident. The United States Supreme Court spoke out persuasively in the case of *Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 28 S. Ct. 34, when it said:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution."

This Court then went on to say:

> *"But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to bring actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."* (Italics ours.)

For further leading decisions of the United States Supreme Court guaranteeing these privileges see *Ward v. Maryland,* 12 U. S. 418; the *Slaughter-house* cases, 16 U. S. 36, 21 L. Ed. 394; *Dennick v. Central R. Co.,* 103 U. S. 11; *St. Louis R. Co. v. Taylor,* 210 U. S. 281; *Stone v. U. S.,* 167 U. S. 178; *Santa Fe v. Sowers,* 213 U. S. 55.

It has been unanimously held that whenever by common law a right of action has become fixed and a legal liability incurred, that liability, if the action is transitory, may be enforced and a right of action pursued in the courts of any state which can obtain jurisdiction of the defendant. See *T. & P. R. Co. v. Cox,* 145 U. S. 593.

It is equally fundamental that actions for libel are of a transitory nature. It was so held by the Illinois Supreme Court in *Owen v. McKean,* 14 Ill. 459. See also 37 C. J., Section 320. The general rule is stated in 33 Am. Jur., Section 227, page 208, wherein it is said:

> "Since actions for libel and slander are of a transitory nature, it is generally held, in the absence of any statutory provision to the contrary, that they may be brought in any jurisdiction or county in which the defendant is found."

It is undisputed that in the case at bar we have an action for libel wherein proper service was had on the respondent while he was in the city of Chicago, Cook County, Illinois, and it is further undisputed that any citizen of the state of Illinois could bring such action. Under the circumstances, and in the light of the privileges and immunities clause of the United States Constitution, as well as the Fourteenth Amendment, petitioner had a right to bring this action just as a citizen of Illinois had a right to bring it, and to hold otherwise is a violation of one of the most fundamental and democratic privileges a citizen of this country enjoys.

II.

The Illinois Court Committed Error in Applying the Doctrine of Forum Non Conveniens so as to Violate the Privileges and Immunities Clause of the United States Constitution.

The petitioner here is a citizen and resident of Cleveland, Ohio. The respondent is a citizen and resident of International Falls, Minnesota. He was properly and personally served while in the city of Chicago, Illinois.

The action is one for libel involving a telegram sent from the respondent to the petitioner.

It has been repeatedly held that before a court will apply the doctrine of forum non conveniens the defendant must make a showing that it will be subjected to great and unnecessary inconvenience and expense. For the doctrine to apply it must appear that complete justice cannot be done in the court in which action has been brought, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that the trial of the action will be attended with difficulties which all would be avoided without special hardship to the plaintiff if action is brought in the jurisdiction in which the defendant is domiciled.

The doctrine of forum non conveniens never has and should not be loosely applied merely because parties are non-residents, but it is only applied where a full and complete showing is made that the defendant will be seriously inconvenienced by the bringing of the action.

The record in this case is completely devoid of any such showing and it is obvious to anyone acquainted with the law that a libel action involving two parties could be just as conveniently tried in Chicago, Illinois, as in any other state in the Union. It will be unnecessary to bring any witnesses any great distance. As a matter of fact, considering that the petitioner is a resident of Ohio and

the respondent a resident of Minnesota, it is impossible to conceive of a more logical and convenient place to try their libel action than in Chicago, Illinois.

The United States Supreme Court in the recent leading case of *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501, 67 S. Ct. 839, wherein the Court held that the doctrine may be invoked under certain circumstances, made it clear that it should not be invoked unless the circumstances of the case call for it when it said:

> *"But unless the balance is strongly in favor of defendant, plaintiff's choice of forum should rarely be disturbed."* (Italics ours.)

Following the *Gilbert* case, Judge Holtzoff in *Cox v. Pennsylvania R. Co.,* 72 F. Supp. 278, said:

> "The court desires to call attention to the fact that the defendant in support of this motion makes a bald and general assertion that all of the material witnesses reside either in Pennsylvania or Illinois. This statement is not supported by any details. Thus, no names or addresses of the witnesses are given, or any statement as to what their testimony would be. While this omission, in itself, seems to constitute sufficient ground for denial of the motion, especially in the light of the fact that the plaintiff names certain witnesses who reside in New York, nevertheless, the court is disposing of the application on the broader ground that even if this defect were cured, and it was clearly demonstrated that all of the material witnesses reside in Pennsylvania or Illinois, sufficient ground for invoking the doctrine of forum non conveniens does not appear."

The court in considering whether to apply the doctrine of forum non conveniens will consider relative ease of access to sources of proof; the availability of compulsory process for attendance of the unwilling; the cost of obtaining attendance of all witnesses; the possibility of a view of the premises; and all other practical problems that make trial of a case easy, expeditious and inexpen-

sive. A court will weigh relative advantages and obstacles to a fair trial.

Considered in this light it is obvious that no showing has been made here pointing out even the slightest inconvenience to the respondent by the choice of this state as the place of the forum other than the claim that the respondent is a resident of Minnesota. A mere showing that one is a resident of another state would under no circumstances be grounds for applying the doctrine of forum non conveniens, even in those states applying such doctrine.

It should also be pointed out that the Supreme Court of Illinois completely overlooked the proposition that in applying the doctrine of forum non conveniens there should be at least two forums in which a defendant is amenable to process.

This Court in the case of *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501, 67 S. Ct. 839, said:

> "In all cases in which the doctrine of forum non conveniens comes into play it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

The Supreme Court of Illinois has completely ignored the language of the United States Supreme Court in the *Gulf Oil Corporation* decision. In the *Gulf Oil* case the plaintiff and defendant were both residents of the State of Virginia. Plaintiff brought his action in New York, when he could have brought it in Virginia where he lived. In the case at bar such is not the case. Respondent could not be reached by process in Ohio where Whitney lived. Under such circumstances the doctrine of forum non conveniens should not be applied.

To apply the doctrine of forum non conveniens to the case at bar is to carry the doctrine so far as to actually nullify the effect of the privileges and immunities clause.

The forum of the residence of the petitioner was closed to him. Under such circumstances he had a perfect right to serve process upon the respondent wherever he could find him. To apply the doctrine of forum non conveniens to such a situation is to use it to encroach upon the privileges and immunities given by the United States Constitution, and a misconstruction of the decision of this Court in *Gulf Oil Corporation v. Gilbert.*

In the case of *Neal, et al., v. Pennsylvania R. Co.,* 77 F. Supp. 423, plaintiffs, residents of New Jersey, brought an action against the defendant, a Pennsylvania corporation, in New York for an injury occurring in South Carolina. The court refused to apply the doctrine of forum non conveniens saying:

> "Plaintiffs can obtain jurisdiction over both defendants by an action brought only in New York or Virginia.
>
> > " 'In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.' *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 506, 507, 67 S. Ct. 839, 842, 91 L. Ed. 1055.
>
> "Here, plaintiffs' choice lies between New York and Virginia. They cannot sue Pennsylvania Railroad in South Carolina, where plaintiffs allege the injuries were received. Since this is so, it cannot be fairly said that plaintiffs by choosing New York as the forum—(within twenty-five miles of their residence)—' "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to' their 'own right to pursue' their 'remedy.' *Gulf Oil Corp. v. Gilbert,* supra, 330 U. S. at page 508, 67 S. Ct. at page 843, 91 L. Ed. 1055."

It is interesting to note that the Supreme Court of the State of Illinois has consistently held that under no circumstances should non-residents be barred in a transi-

tory tort action brought in the State of Illinois. The only exception to this rule is where an action is brought in violation of a statute or public policy of the state. It is admitted here that this action does not violate any statute or public policy of the State of Illinois and, therefore, the doctrine of forum non conveniens was wrongfully applied to nullify the privileges and immunities clause of the United States Constitution.

In the case of *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 197 N. E. 578, a resident of Pennsylvania who was injured in that state prosecuted his remedy in the courts of Illinois and in sustaining his right to do so, the Supreme Court of Illinois said:

> "The action here is in tort for injuries to the person of the plaintiff. Such action is not prohibited by any statute of this state, nor is the maintenance of the action against public morals, natural justice, or the general interest of the citizens of this state. In that situation the doctrine of comity applies, and the cause of action may be pursued in such courts of our state as have jurisdiction of the subject-matter and the person of the defendant. * * * Neither does the fact that the plaintiff is a non-resident deprive him of his remedy in the courts of this state. There is no statute in this state denying redress of grievances by reason of non-residence. The policy of our state has always been to permit persons, regardless of residence, to bring suits in our courts. Citizenship has never been a condition precedent to the right of an individual to sue in our courts * * *."

In the case of *Opp v. Pryor*, 294 Ill. 538, 128 N. E. 580, an action for personal injuries was brought by a resident of Indiana who had been injured in that state. In sustaining the right to bring the action, the Supreme Court of Illinois said:

> "The action was personal for a tort, and might be maintained in any jurisdiction in which the defendant could be legally served with process, unless the cause of action was prohibited by law or public

> policy, or against morals, natural justice, or the general interest of the citizens of the state of the forum."

There is no question but what the respondent here was legally and properly served with process while in the City of Chicago, County of Cook, State of Illinois, and further it is undisputed that the cause of action for libel is not prohibited by law or public policy of the State of Illinois.

In many states either by decision or statute aliens are barred from prosecuting actions, but the Supreme Court of Illinois established a contrary policy and adopted a liberal view in *Kellyville Coal Co. v. Petraytis,* 195 Ill. 215, 63 N. E. 94. In that case a non-resident alien was allowed to bring a tort action in the State of Illinois. It was held that the plaintiff, a resident of Lithuania, had a perfect right to bring a death action and stated:

> "It may be said here that neither citizenship nor residence is requisite to entitle a person to sue in the courts of Illinois. That right is certainly not questioned when sought to be exercised here by citizens of the several states, and we perceive no reason why it should be granted to citizens of the several states of the Union, but denied to persons living in foreign countries."

In *Wabash Railway Co. v. Lindsey,* 269 Ill. App. 152, 160, the Illinois court in referring to the right to a jury trial said:

> "It is a right guaranteed to litigants who might become involved in litigation in the courts of Illinois, whether such litigants be citizens of Illinois or elsewhere."

In *Illinois Life Insurance Company v. Prentiss,* 277 Ill. 383, it was held:

> "A person has the legal right to bring his action in any court which has jurisdiction of the subject

> matter and can obtain jurisdiction of the parties, * * *."

Two cases that are very analogous to the situation at bar are those of *National Can Co. v. Weirton Steel Co.*, 314 Ill. 280, 145 N. E. 389, and *Frank Simpson Fruit Co. v. Atchison, Topeka & S. F. Ry. Co.*, 245 Ill. 596, 92 N. E. 524. In both of these cases one corporation foreign to Illinois sued another foreign corporation for breach of contract where the contract declared upon was not made in the state of Illinois. In both of these cases the Illinois Supreme Court held that the action was properly brought in the state of Illinois, and in the *Weirton* case stated:

> "The action in this case was a transitory action, and there is no statute in force in this state withdrawing permission from foreign corporations to bring suit in this class of action in this state against foreign corporations, where the cause of action arises outside of the state. *Simpson Fruit Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 245 Ill. 596, 92 N. E. 524."

It appears without question in the case at bar that respondent was properly served in person in the City of Chicago, County of Cook, State of Illinois. It appears without dispute that the action, being for libel, is a transitory tort. It also appears without dispute that such action could have been brought by a citizen of the State of Illinois. Under such circumstances, the Supreme Court of the State of Illinois has applied the doctrine of forum non conveniens in such fashion as to violate the fundamental constitutional rights of the petitioner.

CONCLUSION

The right of the petitioner to bring this action is one of the most basic privileges a citizen of this country enjoys and we submit that any decision to the contrary is in conflict with the supreme law of the land.

Respectfully submitted,

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